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Tax Evasion between Legality and Criminal Offense

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Abstract

As a complex phenomenon that occurs as a response of the taxpayer in relation to the state coercion action, tax evasion is a disputed topic both in legal sciences and economic ones branch, being analyzed by the economic law. The purpose of this paper is to prove that tax evasion takes place at the line between licit and illicit activities. To achieve the purpose of the paper we shall use a basic fundamental research, making use of an inductive strategy, namely, observation, and a comparative one, namely historical-comparative and longitudinal, in order to observe the difference in views between the European and national legislator regarding the way to address tax evasion. Involving a question of morality, tax evasion occurs due to purely hedonistic interest of any natural or legal person for profit. Based on various causes (economic, political, legal, psychological), tax evasion should be observed somewhere between tax havens and its criminal character. Efforts to combat tax evasion, expressed in rigorous and stringent regulations take on international forms (FATCA), regional (Savings Tax Directive in 2003 at EU level) and national (Law no. 241/2005 on preventing and combating tax evasion in Romania). The perception of the citizens on tax evasion, its effects on each individual and on the economy in general take different forms of control or acceptance of tax evasion.

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1. Introduction

Modernization of life in general, and of the economic life, in particular, has led to a modernization of crimes, to an adapting of criminality to everyday life. Traditional property crimes (theft from banks etc.) have lost actuality, when it was found that higher profits with lower risks can be achieved by using less rudimentary methods. Sophistication of economic criminality takes the form of economic evasion. At present, the individual is

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aware that higher profit does not come from offenses detrimental to one or more individual patrimonies, but from the damage of a higher patrimony, namely by damaging state property. Research limitation is Romanian and European legislation on tax evasion. Located at the boundary between legality and illegality, tax evasion has not escaped the church rigors, as new Catechism of the Catholic Church includes the Christian's act of tax evasion in the category of new "sins" (McGee, R. (1994) : 411), characteristic to the modern, contemporary world. This assertion should be interpreted from the perspective of the Christian Bible, which in the Gospel of Matthew, presents the episode where after being asked by the Pharisees whether the people have to pay taxes to Caesar, Jesus replies: "Give to Caesar what is Caesar's, and to God what is God's", without making developments in terms of the object which has to be given; therefore, these assertions still raise disputes nowadays (McGee, R. (2006) : 3).

2. Tax evasion in the European Union. Theoretical approach

The difficulty of defining the concept of tax evasion comes from positioning the concept in an interdisciplinary framework, at the boundary between law and economy. The plurality of terms commonly used to define the same phenomenon ("fraud (...) legal or legitimate fraud, illegal fraud, international evasion, legal evasion, illegal evasion, tax havens, shelters, abuse of the right to run from tax, freedom of choosing the least impressive path, tax underestimation, law fraud, underground economy" (Hoanță, N. (1997) : 214) supports the above. Moreover, comparing the legal vocabulary commonly used in different countries we can observe that in the Anglo-Saxon countries the concept of "tax evasion" means tax fraud, while the phrase "tax avoidance" defines tax evasion (Drosu Şaguna, D., Şova, D. (2009) : 280), which could lead to the conclusion that tax evasion is illegal, while tax avoidance is lawful. The legal and grammatical analysis of the concepts of "legal tax evasion" and "illegal tax evasion" shows a tautological expression for the phrase "illegal tax evasion" because, naturally, evasion is synonymous with illicit.

Efforts to combat tax evasion in Europe have been materialized since 1977, when the European Union Council Directive regulated mutual assistance for Member States' direct taxation.

In 1988, a joint convention of the Council of Europe and OECD, signed in Strasbourg, regulated mutual administrative assistance in tax matters. An important step to combat tax evasion in the EU was the Savings Tax Directive in 2003. It was an early form of cooperation in the sense of an effective exchange of information between the EU Member States authorities on earnings deposited into an EU state by a person residing in another EU Member State. What is important is that other non-EU states (Switzerland, Liechtenstein and the U.S.) assumed the provisions of the Directive, except Singapore (another tax haven in terms of bank secrecy), Hong Kong, etc.

Although it is the responsibility of each Member State to combat tax evasion within its borders, along with the phenomenon of Europeanization, tax evasion is taking place across national borders, being organized at European level. In the EU, evasion reaches alarming levels; it is estimated that 1 trillion euro is annually leaking in underground economy through tax evasion offenses. European reality is worrying in terms of the size of underground economy, an aspect emphasized in official EU documents as well.

All E.U. Member States are faced with the phenomenon of tax evasion. The average tax evasion rate is 15.2%; the states which confront this phenomenon at diminished proportions are Austria (8%) and Luxembourg (8.2%). Romania, along with Bulgaria is among the Member States that are last in terms of combating the phenomenon, having alarming rates of 32.3% of GDP, or 29.6% of GDP.

Table 1. Black economy dimension in E.U. Member States

E.U. Member State	2011 (% GPD)	E.U. Member State	2011 (% GPD)
Austria	8%	Ireland	24,3 %
Belgium	17,1%	Malta	25,8%
Bulgaria	32,3%	Holanda	9,8%
Cyprus	26 %	Poland	25 %
Czech	16,4%	Portugal	19,4%
Denmark	13,8%	Romania	29,6%
Grece	28,6%	Slovakia	16%
Finland	13,7%	Slovenia	24,1%
France	11%	Estonia	19,2%
Germany	13,7%	Sweden	14,7%
Hungary	22,8%	Great Britain	11%
Italy	21,2 %	Spain	28,6%
Latvia	26,5%	Luxembourg	8,2%
Lithuania	29 %		

Source: Jensen J., Wohlbier F., „Improving tax governance in EU Member States" în „ Economia europeană", august 2012, p. 11, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp114_en.pdf

These figures indicate the permissive behavior of the authorities towards the phenomenon of tax evasion. Basically, the political governments turn a blind eye to the facts of tax evasion, with the clear aim to remain popular and, consequently, to gain voters.

Evasion regulation at European level is still in its infancy, although one can see the basis for coordinated action. Discussions on tax evasion were initiated in 2006 and were extremely slow. The European Commission Communication on the need to develop a coordinated strategy to improve the fight against fiscal fraud, from May 2006, is the first point won in the regulation of tax evasion. But this act covers only indirect taxes (VAT, excise duties).

At the end of 2012, a new Communication of the European Commission to the European Parliament and the Council of the European Union regulates an action plan to strengthen the fight against tax evasion, through which short-term measures are indicated (in 2014): reviewing legislation on dominant position abuse, promoting a better transfer of information within the EU and internationally, establishing a European tax code, for which the European Commission will initiate public consultations earlier this year, cooperation between Member States will be materialized through cooperation between officials from different Member States and cross participation in tax audits; medium-term measures (in 2014): introduction of the European tax identification code, establishment of a directive on the uniformity of administrative and penal sanctions for tax evasion, long-term measures (post-2014): direct access to tax databases of Member States, joint audit actions.

An important step in the same direction is represented by the entry into force of the Treaty on stability, coordination and governance in the Economic and Monetary Union since January 1st, 2013, along with the submission of the instruments of ratification of the Treaty by Finland (the mandatory condition is that a minimum of 12 Member States has ratified the Treaty, a condition which was met on December 21, 2012). The compliance to Treaty (annual structural deficit should not exceed 0.5% of GDP) means strengthening the fight against tax evasion.

3. Tax havens - levers of legal tax evasion

The global financial system has found a legal way to escape income taxation in the form of legal tax evasion - tax havens. These are characteristic to light taxation systems, the share of GDP tax levy being reduced by about 10%.

Legal tax evasion as tax havens, worldwide, is truly jeopardized by a new rule – Foreign Account Tax Compliance Act (FATCA), a U.S. regulation, which has a large impact, because it concerns the financial system as a whole. FATCA is the cornerstone of the Obama administration in the fight against tax evasion practiced by opening offshore accounts, being truly a revolutionary moment for the international financial system. The target of this regulation is actually rich people, of American nationality or with American citizenship who keep their savings in offshore accounts. We talk about rich people because only offshore accounts exceeding $ 50,000 threshold are subject to FATCA. FATCA provides a withholding tax system at a rate of 30% for foreign financial institutions that refuse to disclose the identity of their customers, with tax residence in the U.S.

Tax regime can be avoided only if these financial institutions conclude agreements with the U.S., whereby the American customers, either individual or legal persons, should be identified, and reports on them sent. Reporting covers both new customers and pre-existing ones. FATCA aims to create a much better cooperation between financial institutions globally. It involves both developed economies and emerging economies, but the way in which it will be implemented in practice remains to be seen, as long as we are in the first year of application of this regulation.

4. Priorities in combating tax evasion

Regulation of taxes itself attracts the existence of tax evasion. In Romania after 1989 tax evasion has become a real social norm, as Romanian taxpayers, regardless of their social status practiced tax avoidance behavior as a habit. (Toader, S.A. : 3) Widespread tax evasion results in ineffective local tax system, the less viable in the European Union. Fiscal sustainability depends on the effective fight against the phenomenon. The highlighted problem is more ardent in the context of global economic crisis, which highlighted the fragility of the Romanian system of public finance. Official figures show that the state budget losses due to tax evasion amount to 10% of GDP share, in 2012 (Canagarajah, Brownbridge, Paliu, and Dumitru, (2012) : 25).

A study performed in the United States in 2008 (McGee, R. (2008) : 3), in 17 states (most of them being previously under Russian influence), including emerging economies (here we can include Romania) shows significant differences in terms of citizens' attitudes on tax evasion. It is found that the average level of tolerance towards tax evasion is localized to the average of 2.66.

Compared to this average, Romania is above it, as the rest of the countries, which have seen the Soviet influence over the years and which presently have a behavior characterized by lack of respect for authority, translated into the evasion tax phenomenon. Denmark and Finland were considered because they are among the least corrupted countries. The figure of 2.00 can be explained in case of Denmark. In the case of Finland, however, the burden of taxes makes the Finns not to consider tax evasion immoral. This assertion is supported by another study (McGee, R. (2009) : 7), which focuses on the comparison between Romania and Moldova on the perception of the citizens of both states on tax evasion, which concludes that Romanians are staunch opponents of tax evasion as compared to the citizens of the Republic of Moldova.

Degradation of fiscal discipline must be combated. Methods may be original or may be borrowed from other economies in the world. Since at least at the time being, the most powerful economy in the world is that of the United States, we point out that the methods to fight tax evasion highlight the interest of local authorities for clear methods: increasing penalties, increasing the risk of being caught by achieving an extended control organized by the authorities, tax amnesty.

Tax amnesty, with the meaning of determining taxpayers living under control risks, of acknowledging escapist past actions could be another viable method to combat tax evasion. The disadvantage lies in the possible change of the honest taxpayers' behavior who can borrow an escapist behavior, so there is a risk of increasing the tax evasion phenomenon.

In addition, to combat tax evasion we may also consider: formation and improvement of the fiscal apparatus, of officials who should be better trained, motivated and honest; development of comprehensive and clear regulations along with complete methodological application rules.

5. Conclusions

Led, typically, by the hedonistic interest with reference to monetary interest, natural or legal persons engage an active and often ingenious behavior in order to avoid the payment of taxes imposed by the state.

Tax evasion takes place today at the line between licit and illicit activities.

Payment of taxes is the effect of citizens fearing the potential sanctions they would suffer if they adopted an indifferent attitude towards the payment of taxes. Naturally, the first step against tax evasion phenomenon is an increase of the severity of combating tax evasion. Failure to act drastically against tax evasion phenomenon leads to the perpetuation of a genuine escapist gene, passed on from generation to generation, having long-term negative effects. The increase of penalties must be sufficient enough to eliminate criminal behavior (penalties should be 49 times higher than the taxes that should be collected from unreported income).

Changing taxpayer's attitudes is another step towards stopping tax evasion, along with the exponential change of attitude of the tax administration towards taxpayers by developing a partnership between them.

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